IMPLICATIONS FROM GIFTS OVER ON FAILURE OF ISSUE.—It is undoubtedly probable that persons who are so much in a testator's mind that he makes their non-existence the contingency upon which a devise over rests are intended to take in the alternative,[1] but is the court to say that such a probability shall have the force of an express gift? At common law, the words dying without issue or their equivalent, being construed to refer to an indefinite failure of issue, raised an estate tail in realty or an absolute gift of personalty[2] in the first devisee. In such cases, of course, no gift to the children could be implied. But implication might be made where by specific words or general intent[3] the testator showed that a definite failure was meant; likewise where the gift over was of personalty, if the first taker *leave* no issue,[4] a case in which a fine distinction was drawn between realty and personalty, due possibly to the endeavor of the courts to avoid the unsatisfactory results of the accepted construction.[5] Since the enactment of statutes providing that, unless otherwise indicated, the phrase "dying without issue" shall be construed to mean a definite failure of issue,[6] it becomes of greater importance to determine whether children, if left, shall take under the will.

Where there is an indefinite gift to A, with a disposition over if he die without children, the possibility of an implication depends primarily upon whether the indefinite gift to A carries the fee. If by statute such gift carries the fee or if the gift be of personalty only, it would manifestly be absurd to make A's expressly absolute interest defeasible, whether or not he has children, when by the terms of the will it is defeated only on the one contingency.[7] If the will shows an intention to give the devisee merely a life estate, an implication, of course, becomes possible.[8] It is difficult, however, to support the cutting down of an absolute gift in personalty or a devise of realty (especially where specifically limited to the devisee's heirs) to a life estate, without further evidence of intention, merely on the ground that a testator, who is so provident as to desire to control the disposition of his property in case there should be no direct descendants, intended such direct descendants to take a definite interest in case of their survival of the first taker,[9] a somewhat doubtful conclusion. Still less to be supported is the unwarranted use in a late Federal case[10] of the rule that an executory devise shall be construed as a remainder, if it may take effect as such, to make the testator's gift a life estate to the first devisee and contingent remainders in the alternative to the children and the second devisee.

The common law rule that "dying without issue" should be construed to refer to an indefinite failure of issue was applied also in a gift of a life estate, thus increasing the life estate to a fee tail.[11] In this country in jurisdictions where this rule of construction has not been modified by statute,

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[1]Jarman on Wills (5th Am. Ed.) *532.
[2]8 COLUMBIA LAW REVIEW 37; Addison *v.* Addison (S. C. 1856) 9 Rich Eq. 58.
[3]Strain *v.* Sweney (1896) 163 Ill. 603.
[4]Forth *v.* Chapman (1720) 1 P. W. 633.
[5]Kales Future Interests § 201.
[6]1 Vict. c. 26 § 29; N. J. Rev. Stat. 1877 p. 1248 § 25; N. Y. Real Prop. L. § 38; Mich. Comp. L. 1871, p. 1327; So. Car. Rev. Stat. 1873 ch. 86, § 10.
[7]Cf, Matter of Disney (1907) 190 N. Y. 128; Fifer *v.* Allen (1907) 228 Ill. 507.
[8]King *v.* King (1897) 168 Ill. 273; cf. Schaefer *v.* Schaefer (1892) 141 Ill. 337.
[9]Wetter *v.* United etc. Co. (1885) 75 Ga. 540.
[10]Anderson *v.* Messinger (1906) 146 Fed. 929.
[11]Machell *v.* Weeding (1836) 8 Sim. 4.

a life estate to A and if he die without issue to B would give A an absolute interest in personalty, and a fee tail in realty converted by modern statutes into a fee simple, or, as in Illinois,[12] into a life estate with remainder to the issue. Yet this rule of construction appears not to have been entertained except in South Carolina, where in the absence of the Statute *de Donis,* the first devisee took a conditional fee.[13] It is agreed both in England and in this country that no implied provision for the children arises from the mere form of the contingency,[14] but, where, in addition, there are other provisions of the will which also raise the inference that the testator contemplated that the children were to take, the several inferences together raise an implied gift.[15] This may occur where the gift over was also to take effect upon the event of "leaving such issue which shall die under twenty-one,"[16] or "that such issue should all die before their shares should become transferable."[17] It is submitted that the early case of *Ex parte Rogers,*[18] repeatedly discredited by the later English cases,[19] may be explained as containing such an additional inference, which aided that arising from the form of the contingency. There the additional provision influencing the mind of the court was not an additional contingency, as in the above cases, but the fact that the provision for a life interest with gift over on failure of children was an afterthought, made in a codicil, whereas the original provision of the will had given the parent an absolute interest under which the children might have benefited.

In a recent Illinois case, *Bond* v. *Moore* (Ill. 1908) 86 N. E. 386, a testatrix had devised and bequeathed all her property to her son for life, but should he die without children, to her nearest relative. There being no further expression of intention, it was held, in accord with the weight of authority, that no devise arose to the children by implication. The agreement of the minority, aside from the reasonable man's viewpoint, seems to be supported only by the rule that a will should, if possible, be construed so as to dispose of the entire estate, and rests on a *dictum* in another recent case,[20] which really involved only the application of the rule in Shelley's case. However desirable it may be to carry out the testator's intention, the safest guide is the words of the will as they stand, unless the entire instrument affords not merely a probable but an undoubted inference that the children should take as purchasers.[21] The court failed to consider the possibility of construing the failure of children as an indefinite failure which, under the statute of entails noted above, would have given the children a remainder without additional evidence of intention. It is doubtful, therefore, both in view of earlier cases[22] and the principal case, whether the common law rule exists in Illinois.

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[12]Ill. Rev. Stat. 345, p. 103, § 5.
[13]Addison *v.* Addison, *supra.*
[14]Neighbour *v.* Thurlow (1860) 28 Beav. 33; In re Rawlin's Trusts (1890) L. R. 45 Ch. Div. 299; Scale *v.* Rawlins (1892) L. R. A. C. 342; Orr *v.* Yates (1904) 209 Ill. 222; Pennsylvania is apparently *contra,* as shown by a long line of cases. Cf. Beilstein *v.* Beilstein (1904) 194 Pa. St. 152.
[15]Seymour *v.* Kilbee (1879) 3 L. R. I. R. 33.
[16]Kinsella *v.* Caffrey (1869) 11 Ir. Ch. Rep. 154.
[17]Harman *v.* Dickinson (1781) 1 Bro. C. C. 91.
[18](1816) 2 Madd. 449.
[19]Ranelagh *v.* Ranelagh (1849) 12 Beav. 200; Lee *v.* Busk (1852) 2 D. M. & G. 810.
[20]Stisser *v.* Stisser (1908) 235 Ill. 207.
[21]Conner *v.* Gardner (1907) 230 Ill. 258; 8 COLUMBIA LAW REVIEW 148.
[22]Kales Future Interests. §§ 201 *et seq.*